STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 28, 2014
v	No. 306577 Wayne Circuit Court
KENNETH KELLEY, Defendant-Appellant.	LC No. 11-004376-FC

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J., *(dissenting)*.

I cannot agree with the majority that the trial court properly vacated defendant's plea agreement after having accepted it. I would therefore reverse defendant's convictions and remand with instructions for the trial court to enter a judgment and sentence against defendant pursuant to the plea agreement.

Defendant was charged with a number of crimes arising generally out of his assault of the victim with a gun and subsequent theft of the victim's coat and cell phone. He entered into a plea arrangement of pleading guilty to assault with intent to do great bodily harm less than murder, armed robbery, and felony firearm, and in exchange a habitual offender notice and several other charges would be dropped. The plea deal included a sentence agreement of the mandatory two years for felony firearm, followed by a consecutive twelve to twenty year term for armed robbery, and a concurrent term of three to ten years for the assault charge.

My reading of the record shows that the trial court took commendable pains to ensure that defendant understood this agreement. Defendant repeatedly insisted that he "want[s] to take the cop, the plea, whatever;" he "just want[s] to get it over with;" and "want[s] to plead guilty." Defendant stated that he "hit [the victim] up side the head" and then "shot him" but did not intend to kill him and took his coat. The court accepted defendant's guilty plea.

Defendant subsequently sent a letter to the trial judge inquiring into the possibility of revoking his plea because he "didn't understand [his] lawyer" and was actually innocent. The letter stated that defendant believed he would receive a plea for fourteen "months," although his later statements would indicate that he probably meant years. It is unclear from the context whether he believed he was told by his attorney to take the plea deal. He stated that he had "learning problems" and "want[ed] to go to trial." He claimed that he had alibi witnesses, although at trial, none would be presented.

The trial court treated defendant's letter as a motion to withdraw his guilty plea pursuant to MCR 6.310(B). The trial court held a hearing, and the following exchange took place:[1]

> *THE COURT*: in regards to the agreement there was a ceiling put on the robbery arm [sic] count of 20 years where as if he goes to trial needless to say he's facing life he being now 20 years of age. And life is let's say pursuant to insurance actuarial tables of 79 so that means he's facing a possible maximum of 59 years. But your motion to withdraw your plea Mr. Kelley.
>
> *[Defendant]*: I take it.
>
> *THE COURT*: You want to withdraw your plea, right?
>
> *[Defendant]*: I'm innocent but I will take it.
>
> *THE COURT*: No, no, no, no. Listen, listen, listen[.]
>
> *[Defendant]*: I will take it I'm guilty. I will take it. I will take 14.
>
> *[Defense counsel]*: Your Honor, may have [sic] a chance to talk the [sic] my client?
>
> *THE COURT*: Sure.
>
> *[Defense counsel]*: Your Honor my client would like to address the Court now.
>
> *THE COURT*: Mr. Kelley.
>
> *[Defendant]*: I want to take the 14.
>
> *THE COURT*: Sorry.
>
> *[Defendant]*: I want to take the 14 years.
>
> *THE COURT*: It's not actually 14 years your plea of involved um three years to ten years on the assault with intent to do great bodily harm less than murder. Twelve years to 20 years on the robbery arm [sic] count. Two years mandatory by the felony firearm charge. And the counts on felony firearm and robbery arm [sic] will run consecutive to each other. In other words you will begin to serve the robbery arm [sic] sentence following the felony fire arm sentence. Now of course you'd have two years on the felony firearm and then followed by the minimum of 12 so that's 14 years yes you do understand that.

[1] Some obviously misattributed statements in the transcript have been corrected.

[Defense counsel]: And the three years to ten years will be--

THE COURT: Concurrent with the felon [sic] firearm charge. Do you understand that? So you got to tell me what you want to do.

[Defendant]: I just told you, sir.

[Defense counsel]: Tell him again.

[Defendant]: I will take the 14.

[Defense counsel]: Okay.

[Defendant]: This ain't right at all. I'm taking the 14 I'm innocent, I'm innocent.

THE COURT: Your motion to withdraw your plea [is] granted.

[Defense counsel]: Okay.

THE COURT: Go to trial young man you're innocent. Go to trial.

Unlike the majority, I believe the entirety of the above colloquy is important. As is obvious, defendant continued to both express his innocence and his desire to take the plea agreement. Despite these statements by defendant, the trial court told defendant that it granted his motion to withdraw his plea. Defendant was subsequently convicted after a trial by the jury as described in the majority opinion.

MCR 6.310(B)(1) provides:

> [A] plea may be withdrawn on the defendant's motion *or* with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. [Emphasis added.]

Therefore, pursuant to MCR 6.310(B)(1), the trial court may withdraw an accepted plea either on defendant's motion or with defendant's consent, as long as the withdrawal was in the interests of justice and would not substantially prejudice the prosecution.[2]

I agree with the majority insofar as it concludes that the trial court permissibly treated defendant's letter as a motion to withdraw his plea and did not err by entertaining the motion despite defendant's representation by counsel. However, I find that defendant's statement, "I

[2] The prosecutor conceded that there was no prejudice to the prosecution.

will take the 14[,]" in response to the trial court's statement, "So you got to tell me what you want to do[,]" unambiguously constituted a withdrawal of the motion to withdraw defendant's plea. Consequently, the first basis for withdrawing a plea under MCR 6.310(B)(1) was no longer met at the time the trial court withdrew the plea.

It is, quite simply, clear from defendant's statement that he wanted to withdraw his motion and proceed with his accepted plea agreement. It is equally clear that defendant was denying his consent to any withdrawal of his plea. Defendant stated a few lines down, "This ain't right at all. I'm taking the 14[.] I'm innocent, I'm innocent." The fact that defendant protested his innocence is irrelevant because at that point, defendant had already made the above statement withdrawing his motion. *People v Strong*, 213 Mich App 107, 112; 539 NW2d 736 (1995). Therefore, the trial court made a decision to withdraw defendant's plea without a valid motion by defendant, without defendant's consent, and after a plea agreement had already been accepted, which constitutes an abuse of discretion. *Strong*, 213 Mich App at 112.

Additionally, the withdrawal of the plea was not "in the interest of justice." The "interests of justice" require a "fair and just reason" for the withdrawal, which "include reasons like a claim of actual innocence or a valid defense to the charge." *People v Fonville*, 291 Mich App 363, 377-378; 804 NW2d 878 (2011). Defendant's assertions of actual innocence therefore constitute "fair and just reasons" for the withdrawal. However, defendant's insistence that he wished to maintain his plea weigh heavily against withdrawal. Significantly, although MCR 6.310(B)(1) does not require defendant's consent if a motion has been made, there is a difference between failing to obtain consent and actively overriding unambiguously-stated requests. Ultimately, defendant's protestations of innocence, while themselves fair and just reasons, cannot be viewed in isolation from the remaining context.

Plea agreements exist in our jurisprudence because they are inherently in the interests of justice. They reduce the allocation of scarce resources to the prosecution of crimes and they permit defendants to have some degree of control over how much risk they wish to undertake. Inevitably, that does mean that, sometimes, people who believe themselves innocent will make a sound tactical decision to plead guilty to a charge because of a reasonable fear that they will otherwise be found guilty of a more serious offense. "Unfortunately the scheme has never yet been devised by human invention by which the power to do great good has not been mingled with the power to do some evil." *People v Gallagher*, 4 Mich 244, 255 (1856). Public policy has established that the interests of justice are served by giving defendants and prosecutors some capacity to negotiate between themselves how much risk either wishes to assume.

It is clear from the transcript, when viewed in its entirety, that defendant and the trial court talked past each other to some extent. Defendant clearly understood what he was agreeing to as a practical matter, despite the trial court's somewhat confusing attempt to explain the legal details of his projected sentence. It is absolutely unambiguous that while defendant may have protested his innocence, he had ultimately decided that he wanted to accept a plea that would result in the agreed upon sentence. This is not a situation in which there was any doubt or

equivocation on defendant's part. Under these circumstances, I conclude that the trial court abused its discretion by overruling defendant's plainly-stated desire not to withdraw his plea. I therefore need not consider defendant's other arguments. Defendant had the right to continue with his plea agreement and that is what justice requires in this case.

I would reverse defendant's convictions and remand with instructions for the trial court to enter a judgment and sentence against defendant pursuant to the plea agreement.

/s/ Amy Ronayne Krause